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In the Supreme Court of the United States

OCTOBER TERM, 1975

BIAGGIO BARRASSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court committed plain error (1) in instructing the jury that a defendant's membership in a conspiracy can be established by all the evidence in the case, including the acts and statements of co-conspirators; (2) in not giving cautionary instructions at the time that statements of co-conspirators were admitted; and (3) in not giving *sua sponte* a limiting instruction concerning the use of concededly admissible evidence of prior misconduct.

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to use extortionate means to collect an extention of credit, in violation of 18 U.S.C. 894.[1] He was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. B, 3a-5a).

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[1]Bruce Margo, Arthur Anastasia, and John DiMeo were also indicted as co-conspirators. Margo's case was severed prior to trial due to his illness and Anastasia's was severed during trial, following which he pled guilty. DiMeo was found guilty, and the court of appeals affirmed his conviction. He has not sought further review.

In August 1972, Rocco Mancinelli began placing bets with co-defendant DiMeo (Tr. 82-84) and paid $9,000 in losses (Tr. 87A-88). Despite having exhausted his funds, Mancinelli continued to place bets and by October 1972 owed DiMeo $2,400 (Tr. 88).

DiMeo requested payment (*ibid.*). He told Mancinelli in person that petitioner was his "partner" (Tr. 89). Because of his past experiences with petitioner, Mancinelli was disturbed (Tr. 89-90).[2]

Later in October, DiMeo told Mancinelli that petitioner "[had] the account and there's weight on the account" (Tr. 95). Mancinelli understood this to mean that the debt had been sold for collection to petitioner, who would require Mancinelli to pay interest on it (Tr. 95-96). In November 1972, petitioner personally visited Mancinelli's wife, identified himself as DiMeo's partner, and warned that her husband "owes me money and he better get it up or I'll get him" (Tr. 631).

In January 1973, DiMeo telephoned Mancinelli and told him that "two men are going to come into your house, they're going to break the doors down and they're going to bust you wide open and send you to the hospital" (Tr. 101-102). The following month, co-conspirator Margo and another man forced their way into Mancinelli's home and

[2]Mancinelli testified that he had placed a $200 bet with petitioner seven years earlier, but had only paid petitioner $100 when he lost. A few weeks later, while picking up his wife outside her place of employment, Mancinelli saw petitioner nearby brandishing a gun (Tr. 91). When Mancinelli and his wife drove away, petitioner followed in his car. Unable to elude petitioner, Mancinelli finally stopped, and his wife talked to petitioner, who had parked behind them. She then gave petitioner all the money that she had earned that day (Tr. 92, 632). Mancinelli also testified that a few months later, while sitting in a bar, petitioner "grabbed me by the throat, muscled me around, and demanded $200" (Tr. 93), leading Mancinelli to pay petitioner $200 he borrowed from a friend (Tr. 93-94).

severely bludgeoned him (Tr. 106-108, 112). On March 6, Margo telephoned Mancinelli and demanded payment of the debt owed DiMeo, which was then said to be $3,700 (Tr. 113).

During late March and early April, DiMeo, Margo, and co-conspirator Anastasia repeatedly spoke to Mancinelli, both in person and by telephone, about payment of the debt (Tr. 226, 229-235, 240-242, 246-260, 268-284, 286-298, 301-305, 310-312, 313-315). In these conversations, tape recorded by Mancinelli, the three co-conspirators frequently alluded to petitioner's interest in collecting the debt (Tr. 250, 253-254, 268, 271, 277, 287, 293-294, 302-303). Then, when Margo and Anastasia went to Mancinelli's house on April 3 to collect the debt, federal agents arrested them (Tr. 328, 619).

1. Petitioner contends (Pet. 12-17, n. 5) that the trial court committed "plain error" when, without objection, it instructed the jury, consistently with prior decisions of the court of appeals,[3] that it could consider declarations of his alleged co-conspirators in determining whether he was a member of the alleged conspiracy.[4] Petitioner contends,

[3]See, *e.g.*, *United States* v. *Bey*, 437 F.2d 188, 191-192 (C.A. 3); *United States* v. *Van Orden*, 469 F.2d 461, 464 (C.A. 3); *United States* v. *Rodrigues*, 491 F.2d 663, 666 (C.A. 3).

[4]The court instructed (Jury Instructions, Tr. 22):

> Whether or not a defendant was a member of the conspiracy must be determined upon the evidence that you have heard as to his own actions, conduct, statements and declarations as well as his own connection with the acts and conduct of the other alleged co-conspirators. You may in addition consider and weigh the acts and declarations of the other co-conspirators bearing on the question of a defendant's membership in the conspiracy.
>
> In short, whether or not a defendant is a member of a conspiracy may be determined upon the reasonable inference to be drawn from all of the evidence in the case including the evidence that you have heard as to his own actions, his own conduct, his own connection with the acts and conduct of the other alleged co-conspirators.

in substance, that the trial court, *sua sponte*, should have ignored the controlling decisions of the court of appeals and should instead have given the charge now proffered by petitioner (but not proffered to the trial court), endorsed by several other courts of appeals.[5] Under that charge, before it can consider declarations of co-conspirators, the jury must find beyond a reasonable doubt, on the basis of independent non-hearsay evidence, that a conspiracy existed and that the defendant joined it.

However, if petitioner wished to challenge the rule previously adopted by the court of appeals (and by the Second and Ninth Circuits[6]), under which the jury may consider such declarations if the trial court first determines that the independent evidence establishes those facts by a fair preponderance, he had the obligation to raise the issue in the trial court by objecting to the charge given and tendering a charge reflecting what he now claims should be the law. His failure to do so bars him from raising the issue on appeal or in this Court. Indeed, the court of appeals' *per curiam* affirmance may merely reflect that fact. In any event, there is no showing that the issue is sufficiently important that the conflict among the circuits requires resolution by this Court. The issue does not affect fundamental rights, but concerns only the allocation between judge and jury of the responsibility for determining whether threshold

[5]See, *e.g.*, *Reistroffer* v. *United States*, 258 F.2d 379, 387, n. 3 (C.A. 8); *Dennis* v. *United States*, 346 F.2d 10, 16 (C.A. 10), reversed on other grounds, 384 U.S. 855; *United States* v. *Grow*, 394 F.2d 182, 203 (C.A. 4), certiorari denied, 393 U.S. 840; *United States* v. *Rizzo*, 418 F.2d 71, 82 (C.A. 7), certiorari denied *sub nom. Tornabene* v. *United States*, 397 U.S. 967.

[6]*E.g.*, *United States* v. *Projansky*, 465 F.2d 123, 137-138 (C.A. 2), certiorari denied, 409 U.S. 1006; *Carbo* v. *United States*, 314 F.2d 718, 735-738 (C.A. 9), certiorari denied, 377 U.S. 953. But cf. *United States* v. *King*, 472 F.2d 1, 9 (C.A. 9).

conditions of admissibility are met for certain types of evidence, a matter that need not be uniformly resolved among the circuits.

2. Petitioner also challenges (Pet. 17-19) the trial court's failure to give *sua sponte* a limiting instruction concerning the declarations of co-conspirators when such evidence was received. Petitioner did not object to such evidence or request such an instruction. Moreover, as petitioner acknowledges (Pet. 19), under prior decisions of the court of appeals such an instruction was unnecessary because it is for the judge, not the jury, to make the determination that there is sufficient independent evidence of the defendant's membership in the alleged conspiracy to render admissible the declarations of co-conspirators. See, *e.g.*, *United States* v. *Bey*, *supra*, 437 F.2d at 191-192.[7] The failure to give such an instruction was not "plain error," and petitioner's failure to seek it is fatal to his effort to press the issue in this Court.

3. Mancinelli testified about petitioner's prior extortionate collections of credit from him. Although he did not object to this evidence at trial and does not now contest its admissibility (Pet. 20),[8] petitioner contends that the

[7]*Lutwak* v. *United States*, 344 U.S. 604, on which petitioner relies (Pet. 17-18), is not to the contrary. While the Court stated that the trial court must limit the admissibility of declarations of co-conspirators at the time of their admission in evidence, the only such declaration involved there had been objected to (Record, *Lutwak* v. *United States*, October Term 1952, No. 66, p. 208) and the court's charge imposed upon the jury, rather than the judge, the responsibility of determining whether there was sufficient independent evidence to show that a defendant participated in the conspiracy (*id.* at 337-338).

[8]The evidence was properly admitted both to show Mancinelli's state of mind regarding petitioner's use of extortionate means to collect debts (see, *e.g.*, *United States* v. *Frazier*, 479 F.2d 983, 986 (C.A. 2); *United States* v. *DeCarlo*, 458 F.2d 358, 367 (C.A. 3) (*en banc*), certiorari denied, 409 U.S. 843), and to show a plan, scheme, intent, or *modus operandi* of the conspirators. See, *e.g.*, *United States* v. *Chrzanowski*, 502 F.2d 573, 575 (C.A. 3); *United States* v. *Bonanno*, 467 F.2d 14, 17 (C.A. 9), certiorari denied, 410 U.S. 909.

court erred in failing to instruct the jury that the evidence was received for limited purposes. Petitioner did not request such an instruction (Tr. 963-968) and its omission was not plain error. *E.g., United States* v. *Carter*, 401 F.2d 748, 750 (C.A. 3), certiorari denied, 393 U.S. 1103. In any event, neither the omission of the instruction nor the propriety of applying the "plain error" rule in these circumstances presents a question warranting further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.